A Review of the Challenge of Management’s Right to Modify Job Description

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Purpose

This paper examines existing practice and research on the interpretation of the scope of bargaining in labor negotiations and the application of mandatory versus discretionary subjects and their impacts on management rights with regards to determining the content of job classifications for city employees.

Methodology

This paper will evaluate the California public sector’s duty to bargain and the various components of mandatory and discretionary subjects. With a focus on the interpretation of topics included in the category of “other terms and conditions of employment”, this paper will also discuss whether management is obligated to negotiate the content of job descriptions. This will be accomplished by a review of relevant literature, California public sector law, a survey of public agencies, and several examples of PERB and court decisions.

Recommendations

The practices of several public agencies were reviewed to identify policy/practice recommendation for the City of Purell to adopt in order to reduce the number of grievances relating to job descriptions submitted by Service Employees’ International Union (SEIU) members. And also to shorten the time it takes to create new job classifications and implement content changes to existing ones.

This paper offers two recommendations to the City of Purell: 1) develop a comprehensive Employer-Employee Relations Resolution and 2) create a robust Management Rights clause to be included in employer – employee relations resolution, merit rules, and labor agreements.

Challenge

There have been instances where it has taken the city two years to resolve proposed modifications to existing descriptions assigned to the SEIU labor unit. The delay was primarily caused by the union’s practice of appealing and grieving most recommendations even when changes were not substantive.
In the spirit of collaborating and promoting a positive work environment, the city’s practice is to meet and confer on changes in job duties, content, and wage ranges or steps. The city’s Merit Rules state that a recognized employee organization has the right to meet and confer in good faith with management regarding wages, hours and other terms and conditions of employment; management rights as indicated in Section 1207D of this regulation states that exclusive rights of city management include, but are not limited to: determine the missions of its constituent departments, sections, groups and individuals; set standards of services; determine the standards of selection for employment and promotions; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means, time and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its missions and exercise complete control and discretion over its organization and technology of performing its work.

Although the merit rules and regulations clearly state that the city holds the right to determine the content of job classifications, Purell’s practice has been to meet and confer on job description content even to the point of arbitration.

The situation is further complicated by the SEIU MOA language stating that if the city and union can not reach agreement on the appropriate level for a job to be reclassified or if an employee or union disagrees with the appropriateness of the description, wages or steps assigned, the union can file a grievance. This entails a lengthy process that can delay the process for up to two years.

The SEIU contract also allows the “accuracy” of the revised classification description to be decided by an arbitrator. In most cases, rather than taking the matter to arbitration the city’s position has been to forego implementing the changes, resulting in the status quo. This process hinders the city’s ability to address the changing service needs of the organization.

The Obligation to Negotiate in Good Faith

Various laws and regulations govern labor negotiations. The Meyers-Milias Brown Act (MMBA) governs labor-management relations and collective bargaining in California local governments. The California Public Employment Relations Board (PERB) is the administrative agency charged with administering the MMBA.

The MMBA provides that the governing body of a public agency shall meet and confer in good faith regarding wages, hours and other terms and conditions of employment with representatives of recognize employee organizations. The MMBA defines meeting and conferring in good faith as having the mutual obligation to personally meet and confer promptly upon request by either party and continue for a reasonable period of time in order to freely exchange
information, opinions and proposals and to endeavor to reach agreement on matters within the scope of representation.

The scope of representation includes all matters related to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of merits, necessity, or organization of any service or activity provided by law or executive order.

The Scope of Bargaining Overview

The scope of bargaining is central to collective bargaining, when the union and employer sit down to negotiate an agreement, there are certain limitations on subjects about which they may and may not negotiate. In the absence of specific language, administrative agencies or the courts resolve ambiguities within the scope of bargaining guidelines.

Whether the negotiations take place under the National Labor Relations Act in a private sector or under various federal, state or local laws or ordinances, there are usually three broad categories into which negotiations may be classified, although particulars vary with applicable governing laws.

The first category contains *mandatory subjects* of bargaining, which the parties must negotiate. The failure to do so constitutes an unfair labor practice. In the private sector, wages, hours and conditions of work are considered mandatory subjects. I should point out that, although something may be mandatory, the law is explicit about concessions not being required. As long as the employer is willing to discuss wages with the union at reasonable times and places, they are not required to make any compromise.

In the public sector, the mandatory scope of negotiations is often far narrower than in the private sector. State or local legislatures may decide that certain subjects may not be appropriate for bargaining, which leads into the second category, prohibited subjects. *Prohibited subjects* are those subjects that, if included in a collective bargaining agreement, are unenforceable as a matter of law. For instance, a right protected under federal or state law cannot be bargained away in an agreement. Though the courts and administrative agencies have rendered few decisions defining prohibited subjects of bargaining, a general guideline is that an agreement cannot contain a topic which has been determined by law to be either the sole responsibility of one party or else illegal under federal or state law. In the federal sector, wages, a mandatory item in the private sector, is a prohibited subject.

The third category is called *discretionary subjects*, which are those subjects that either side may, but are not required to bargain. Neither side may insist on a discretionary subject to the point of impasse or a condition to agreement on other
issues. In the same way, internal management affairs known as management rights are usually not subjects of collective bargaining.

In sum, these three categories of subjects are found in both public and private sectors however the content of each category can vary considerably, depending on applicable law and judicial interpretation. For the purpose of this paper the focus will be on mandatory subjects.

**Mandatory Subjects**

Currently the courts and the Public Employment Relations Board (PERB), the quasi-judicial administrative agency charged with administering the collective bargaining statutes covering employees of California's public agencies consider the following items to be mandatory subjects under the general definition of wages, hours and other employment terms and conditions:

**Wages:** Wages and other economic benefits, including overtime pay, extra-duty pay, uniform allowance, use of agency car, mileage, tuition reimbursement, health insurance, tax-deferred annuities and deferred pay, holiday schedules and pay, pay for standby and on-call time, longevity pay, merit pay, wages paid to volunteers, parking fees that significantly affect employees, pay raise retroactively, non-statutory or permissive aspects of retirement policies and benefits, including insurance benefits.

**Hours:** Vacations and rest periods; work and shift assignments, work schedules, maximum hours, shift changes, caseloads, overtime assignment procedures, annual leave policies, annual work calendars, and the hours and shifts for vacant positions.

**Working Conditions:** Transfers, job bidding opportunities and procedures, personnel files, seniority, effects of layoffs, safety, job training, representation rights including released time and grievance procedures, discipline and evaluation processes, negotiations processes, changes in bargaining unit work, agency fee arrangements, "reclassification of positions," safety rules, layoff procedures and effects, promotion policies, drug-testing practices, use of agency facilities, that right to consult an outside attorney, hiring issues, subcontracting decisions resulting in layoffs, loss of overtime, reduction in size of bargaining unit, fax/phone/email use policies, and name tags.

According to MMBA the subject of "reclassification" is restricted to the effects of the creation or abolition of classification or reorganization. It further states that assignment of duties (new classification) and the assignment of job duties reasonably related to a current job class (revised job description and reclassification) are outside the scope of bargaining.
Matters Out-side the Scope of Bargaining

PERB has determined that the following subjects are employer prerogatives, not within the scope of bargaining: determination of the work to be performed and the level of service to be provided; decisions to create or abolish a job class, hiring, decision to lay off employees; no-cost employee assistance plans, non-discrimination policies regarding students, prison staffing levels, medical benefits for current retirees, makeup and dissemination of student test scores; and “whistleblower” policies that do not have a direct impact on discipline or employee privacy.

In addition, court cases interpreting the MMBA have determined that public agencies are not required to bargain about subjects within management’s prerogative, promotional rules required by anti-discrimination laws, subjects that another law leaves the agency little discretion, illegal subjects, or subjects that have only a “trivial” effect on mandatory subjects.

Management Rights

Union and management’s disagreement of which personnel functions and policies are essential to the merit principle, and should therefore be reserved for management decision-making only. Also are closely linked to scope of bargaining disputes. Management rights are defined as outside the scope of bargaining and are prohibited from collective negotiations. Whereas unions seek to define bargaining very broadly, management tries to keep the scope of bargaining narrow.

Management rights are an important part of virtually every contract. They give the employer the right to maintain unilateral decision-making power over matters such as the right to hire, fire, determine the merits, mission, budget, organization, necessity and scope of public services or programs. However, actions by an employer to exercise its rights that also impact the terms and conditions of employment of represented employees require notice and an offer to bargain over the matter.

Decisions about what work to perform, including how much work to perform, are also management decisions.

The Challenge of Exercising Management Rights to Modify Job Descriptions

Unions are interested in job descriptions and classification plans because they serve as the framework for the agency’s compensation structure. The product of the job classification is an ordering of individual positions within the job classes.

Public management has typically viewed classification as a management prerogative and hence not a proper subject for bargaining. The basic argument is that the classification of positions is an objective, scientific enterprise that
serves as the cornerstone of the merit system. Positions are placed into classes in accordance with empirically determined descriptions. However, the union position is that position classification is inherently subjective and arbitrary, especially when positions are classified across occupational functions. For example, should a data entry person be compared to a shipping clerk, or a senior secretary to a new assistant personnel officer? Such decisions, the union claims, involve value judgments. Therefore, they should be subject to collective bargaining.

In Federal employment, according to Title VII of the Civil Service Reform Act of 1978, agencies may negotiate...on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty…” In most federal contracts, unions participate in position classification. In some, for instance, unions exercise influence through joint committees on position classification standards.

Position classification is increasingly being pulled within the scope of bargaining in state and local jurisdictions. Unions accept the need for a system of position classification, but they want to have a voice in it because it affects compensation so directly.

PERB and Court Cases on Scope of Bargaining:

Assignment of job duties that are reasonably related to classification is not a mandatory subject of bargaining:

PERB dismissed an unfair practice charge by the IPEFTE, Local 21 (PERB Dec. No. 1932-M [32 PERC 14]) that asserted that the City and County of San Francisco violated its duty to bargain by unilaterally changing the project assignment of an airport contract compliance officer in response to a contractor’s complaint. PERB affirmed its long-standing rule that the assignment of job duties that are reasonably related to an employee’s classification is not a mandatory subject of bargaining. Because the change in the compliance officer’s job/project assignment was not within the scope of bargaining, the City’s assignment decision was not a unilateral change violation, which required bargaining.

Employer may change job duties to new duties reasonably comprehended within the existing job duties without an obligation to bargain:

PERB used a different approach than what was described in the previous case example of the City and County of San Francisco, but reached the same conclusion, dismissing AFSCME Council 57, Local 146’s (PERB Dec. No. 1939-M [32 PERC 35]) unfair practice charge against the Sacramento Housing and Redevelopment Agency. PERB ruled that the union failed to state a claim for a unilateral change, because it did not demonstrate actual changes in the employee’s job duties. The agency reassigned duties previously performed by more specialists to employees in a more generalist classification. The alleged changes to the job duties were reasonably comprehended within the existing generalist classification’s job duties. The agency had the unilateral right to assign
these duties to the generalist employees even though the employees had never before performed the duties.

*Change in Court Reporters’ job duties is not within the scope of representation:*

PERB decided that Fresno County Superior Court (PERB Dec. No. 1942-C [32 PERC 38]) did not violate the Trial Court Act by implementing a unilateral job requirement for court reporters to provide “real-time” reporting services. Of importance to PERB was the Trail Court Act’s express exclusion from the scope of representation of the automation and delivery of court services. In addition, because the employer has lawfully implemented the new job requirement, it was permitted to take necessary steps to implement the policy, including consulting with employees.

**A Survey of Bay Area Cities**

To provide a reliable recommendation for the City of Purell, we invited twelve Cities to participate in a survey. A total of nine agencies (or 75%) participated. The survey focused on three areas, which were from recommendations presented in this paper:

- Practical application of management/city rights in the labor management environment
- Subjects most commonly covered in the meet and confer process
- Agency practice to meet and confer on the content of job descriptions

**Survey Cities**

| Alameda   | San Jose       |
| Berkeley  | San Mateo     |
| Daly City | Santa Clara   |
| Fremont   | S. San Francisco |
| Hayward   | Sunnyvale    |
| Mountain View | Redwood City |
Survey Findings

The pie chart shows that of those responding to the survey, seven agencies have comprehensive Employer-Employee Relations Resolution that clearly outline management/city rights with regards to determining the content job descriptions/classifications; eight agencies reported having the management/city rights outlined in their labor agreements; eight agencies reported that they meet and confer only on subjects required by the Meyers-Milias Brown; seven agencies advise and discuss job description changes with the union but ultimately hold the right to determine the content of job descriptions; two agencies meet and confer on job description changes.

Recommendations for the City of Purell

1. Develop a more comprehensive Employer-Employee Relations Resolution

The city should work closely with the unions in developing and implementing a comprehensive Employer-Employee Relations Resolution that promote full communication between the city and its employees by providing orderly procedures for the administration of employer-employee relations between the city management and its employee organizations and for resolving disputes regarding wages, hours, and other terms and conditions of employment.

The comprehensive resolution would strengthen the city’s existing methods of administering employer-employee relations and promote the improvement of personnel management and employer-employee relations through providing a uniform basis for recognizing the rights of city employees and the right and responsibility of city/management; a resolution clearly defines the scope of negotiations, representation limitation, representation proceedings, and the
administration of issues such as newly established classifications, grievances, resolution and impasses, policies and procedures, availability of data, and severability.

2. Create a robust Management Rights Clause

The management rights clause serves several important functions. First, it limits the bilateral contract to the express terms, and leaves to management’s discretion the otherwise grey areas surrounding the contractual provisions. Second, it provides a stronger case for the waiver of the duty to bargain. In both instances, this allows greater management freedom to operate without recourse to bargaining. Finally, in arbitration over a provision of the collective agreement that is ambiguous, the city can argue that the management rights clause allows the agency to act under its discretion within the ambiguity.

Admittedly, such provisions are strong, but it can be argued that if the City of Purell is to prosper it must have the authority to make the best bargain it can for work and services. The city should insist that the primary consideration for their granting any contractual benefits to the union is the inclusion of a strong management rights clause. Such a provision is basically the foundation of the agreement insofar as management is concerned.

What is troubling about this recommendation is that although Article XXI of the SEIU MOA states the parties acknowledge that Management rights as indicated in Section 1207D of the Merit System Rules and Regulation… are neither abrogated nor made subject to negotiations by adoption of this MOA, Article XXIV Section 2 states that the MOA shall prevail over any conflicting merit rules and regulations. What is conflicting is that the city holds management’s right to determine the content of job classification, and yet its practice is to meet and confer over job description changes. Undoubtedly, the union could contend that management abrogated any of its historical rights by this practice over many years.

The concept of past practice can be argued under principles endorsed by the U.S. Supreme Court, in that union contracts also include implied agreements. Implied agreements by conduct are understandings between an employer and a union that are unwritten and unspoken and grow out of actions of the parties in following an open and consistent course of conduct over a period of time. A failure to adhere to an implied agreement is as much a violation of the contract as failure to adhere to a written provision. Past practice is used by arbitrators to judge how a contract term has been interpreted when the language of the agreement is ambiguous.

In this case, labor management should strategize with the legal department to determine the best way to frame the proposal of a robust management rights clause that expressly states management’s objective to determine the content and intent of job classifications.
Summary

Does the content of job descriptions fall under the scope of bargaining as part of wages, hours and other terms and conditions of employment? No, because the MMBA states that agencies are only responsible to meet and confer over the effects of a job description change. The MMBA further holds that assignment of duties to a new classification and the assignment of job duties reasonably related to a current job classification are outside the scope of bargaining.

With respect to the challenges of implementing content changes to job classifications, it is clear from the PERB and court rulings that job description content is not a mandatory subject of bargaining. Survey results revealed that most agencies advise and consult with the union on job description changes and only meet and confer on the effect of the changes. The survey also showed that most cities uphold the agencies' right to determine the content of classifications with the support of having a solid management rights clause in place, as well as a comprehensive employee relations resolution. It is safe to say, that there could be administrative efficiencies gained by developing a comprehensive employer-employee relations resolution and robust management rights clause. In addition, the management rights clause should be clearly acknowledged in the merit rules and regulations, employer-employee relations resolution, and the memorandum of agreements.

Conclusion

One of the major challenges facing labor management is the ability to have unions accept and support the strategic vision of public agencies. Collaboration is a key concept in the success of negotiations. Nonetheless, faced with current economic realities, the traditional meet and confer style needs revisiting. Developing a comprehensive employer-employee relations resolution and robust management rights clause is the first step for cities in managing the labor negotiation process.

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References


